The respondent's attorney in his affidavit in reply states that the application by way of motion is misconceived. The respondent's attorney also states that the terms and conditions printed on the reverse of the receipts were the unilateral acts of the applicants and not binding on the respondent. Further, this affidavit states that the respondent has not been in arrears of rent. It also states that neither the applicants nor their servants or agents met the respondent or his attorney to collect rent. This affidavit further states that it was the duty and practice of the 1st applicant or his agent to call personally at the premises for rent and it was the respondent's attorney who personally handed over the rent.

On the other hand, the 1st applicant in his reply states that he has never received any rent from the respondent's attorney but admits that at times the rent was collected at the premises.

At the outset of the trial counsel for the respondent raised a preliminary objection on the ground that the present application by motion is irregular and not authorised by any rule of court or by any specific written law and therefore the application should be dismissed. It is his contention that because of the definition of "proceedings" in section 2 of the Rule Committee Ordinance, 1955, all civil proceedings other than those provided by O. 52 r. 1 of the Rules of the Supreme Court should be by way of action in accordance with O. 1 r. 1 of the Rules of the Supreme Court.

Counsel for the applicants states that as this application is for the recovery of possession of premises it falls under section 16(1) of the Control of Rent Act, 1966, and under this provision an application has to be made to a court. He therefore argues that this application is in order in view of the words "any proceeding" used in section 13 of the Control of Rent Ordinance, 1956, and by reason of the commentary by *Craies*, 6th Edition, on Statute Law at page 400 under the heading "Pending actions affected by new procedure or provision as to costs".

In *re Meister Lucius & Bruning, Ltd.*[1] it was held that where a Statute provides for an application to the court without specifying the form in which it is to be made, and the rules do not expressly provide for any specific procedure, such application may usually be made by originating motion. Section 16(1) of the Control of Rent Act, 1966, also states that all applications for the recovery of possession of premises shall be made to a court and no procedure for making the application is provided for in the said Act or its Rules. Therefore in my view an application for recovery of possession of premises by originating motion is not irregular.

In *E'Singam* v. *Dr. Sundram & Ors.*[2] it was held that the question at issue being one of fact, it had to be determined in open court and was not suitable for determination by the procedure of originating summons. Again, in *Ong Yok Chu & Anor.* v. *Yong Teck Fong & Anor.*,[3] it was held (a) it is contrary to all decided authorities to try disputed issues of fact on an originating summons; and (b) the plaintiffs should they so desire to obtain the relief they seek ought to proceed by writ. Similarly, it is apparent from the affidavits in the present case that there are a number of facts in issue which are in dispute and, in my view, these questions of facts can only be determined by the examination and cross-examination of witnesses in open court and therefore the present application by originating motion is not suitable or proper. The application is therefore dismissed with costs.

*Application dismissed.*

Solicitors: *N. Sharma; S. Seenivasagam & Sons.*

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## ASSA SINGH v. MENTRI BESAR, JOHORE

**[F.C. (Azmi L.P., Ong Hock Thye C.J. (Malaya), Suffian and Gill F.JJ. and Raja Azlan Shah J.) March 17, 1969]**

**[K.L. — Federal Court Special Case No. X.1 of 1968]**

*Constitutional Law — Constitution of Malaysia, arts, 5, 9 & 162 — Pre-Merdeka law inconsistent with Constitution — Power of court to apply law with such modifications as may be necessary to bring it into accord with provisions of Constitution — Deprivation of personal liberty — Right to be informed of grounds of arrest, to consult and be defended by legal practitioner of his choice and to be produced before a magistrate — Restricted Residence Enactment (Cap. 39).*

*Restricted Residence Enactment (Cap. 39), s. 5 — Power of Minister to make order on subjective belief — Whether such power can be delegated.*

In this case the learned judge at Johore Bahru referred the following question to the Federal Court under section 48 of the Courts of Judicature Act, 1964: "Are the provisions of the Restricted Residence Enactment authorising the detention and/or the deprivation of liberty of movement contrary to the provisions of the Federal Constitution and void?"

The applicant in this case had been arrested and detained by the order of the Mentri Besar of Johore under the Restricted Residence Enactment in exercise of the powers purported to be delegated to him by the Minister of Interior and Justice. It was argued in this case that the Enactment has no provision: (i) for informing the person concerned of the grounds of his arrest and detention; (ii) for presenting him before a magistrate or for an enquiry at which the detained person could meet the allegations against him; (iii) for review; (iv) for limitation of the period of detention. Because of these reasons it was submitted that the provisions of the Enactment were inconsistent

with the provisions of articles 5 and 9 of the Constitution.

**Held:** (1) the Restricted Residence Enactment is a law relating to public security and therefore its provisions are not inconsistent with article 9 of the Constitution;

(2) the Enactment does not have provisions similar to those of clauses (3) and (4) of article 5 of the Constitution but this does not make it un-constitutional; despite such inconsistency with the Constitution the Enactment is in force, but it must be applied with such adaptations as may be necessary to bring it into accord with the Constitution;

(3) the provisions of clauses (3) and (4) of article 5 of the Constitution must therefor be read into the provisions of the Restricted Residence Enactment;

(4) the delegation by the Minister of his powers under the Enactment is a valid one and the Mentri Besar can therefore validly exercise all the powers and duty of the Minister under section 2 of the Enactment.

*Cases referred to:—*

(1) *Surinder Singh Kanda* v. *The Federation of Malaya* [1962] M.L.J. 169, P.C.

(2) *Aminah* v. *Superintendent fo Prison* [1968] 1 M.L.J. 92.

(3) *Mungoni* v. *Attorney-General of Northern Rhodesia* [1960] A.C. 336; [1960] 2 W.L.R. 389.

(4) *Chia Khin Sze* v. *Mentri Besar, State of Selangor* [1958] M.L.J. 105.

(5) *Local Government Board* v. *Arlidge* [1915] A.C. 120.

(6) *Keshavan Madhava Menon* v. *State of Bombay* [1951] S.C.R. 228.

(7) *State of Bombay* v. *Shivbalak* [1965] 1 S.C.R. 211.

FEDERAL COURT.

*Dato' David Marshall* (*Amarjit Singh* with him) for the applicant.

*Dato' Mohamed Salleh bin Abas* (Solicitor-General) (*Ajaib Singh,* Senior Federal Counsel, with him) for the respondent.

*Cur. Adv. Vult.*

**Azmi L.P.:** The learned judge at Johore Bahru has referred under section 48 of the Courts of Judicature Act, 1964, for our determination the following question:—

"Are the provisions of the Restricted Residence Enactment authorising the detention and/or the deprivation of liberty of movement contrary to the provisions of the Federal Constitution and void?"

The facts would appear to show that one Assa Singh s/o Teja Singh was arrested and detained by the order of the Mentri Besar of the State of Johore under the Restricted Residence Enactment (Cap. 39 of the Laws of the Federated Malay States) in exercise of powers purported to have been delegated to him under L.N. 279 dated 20th August, 1959 by the Minister of Interior and Justice. I will hereafter refer to the Restricted Residenct Enactment as "the Enactment."

Assa Singh immediately after arrest protested against his arrest and detention. Among other things, he complained that he was never informed of the reasons for his arrest and detention, but this was however disputed in the affidavit sworn by the police officer responsible for his arrest.

On or about 3rd October 1968 Dato' Marshall for Assa Singh filed a motion in the High Court at Johore Bahru for an order of the nature of *habeas corpus* to direct the Mentri Besar of Johore to produce Assa Singh, hereinafter referred to as "the applicant" before the High Court and to show cause why the applicant should not be set at liberty. The grounds for the application are as follows:—

"The warrant of arrest and detention and the present detention of the abovenamed applicant and threatened exile to Pengerang, Johore are illegal and wrongful in that:

(i) The provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void.

(ii) The said warrant of arrest and detention was made without adequate consideration and is not made *bona fide*, and is of no effect.

(iii) The abovenamed applicant was not supplied with the grounds of his arrest and/or detention either timeously or at all.

(iv) The applicant does not know the grounds of his detention and has not been permitted any opportunity to make any representations concerning them nor is he being offered any opportunity to know the said grounds adequately for the purpose of making any representation.

(v) The applicant has not been informed of an inquiry which may have been held by the Honourable the Mentri Besar of Johore prior or subsequent to the applicant's detention."

The learned Solicitor-General at the hearing objected to this reference on the ground that the learned judge should have first decided the question himself. He, however, concluded towards the end of his argument that this court nevertheless had jurisdiction to hear and determine the question. So we proceeded to do so.

It is necessary, having regard to the way counsel for the applicant argued his case to set out the relevant provisions of the Enactment as they originally were and as subsequently amended from time to time immediately before and after Merdeka. Section 2 as it was enacted in 1933 reads as follows:—

"(i) Whenever it shall appear to the Resident on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim in the State or should be prohibited from entering into any particular district or districts or mukim or mukims in the State, the Resident may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he

is already in prison, for the detention of such person.

(ii) The Resident thereafter after such further enquiry as he may deem necessary shall lay before the Ruler of the State a written statement of the grounds on which it appears desirable to him that an order should be made under this sub-section and thereupon the Ruler may, with the advice and consent of the Resident, make an order in the Form in the Schedule that from a date to be stated in such order, such person do reside in such district or mukim as may be specified in the order or do not enter into such district or districts or mukim or mukims as may be so specified.

(iii) An order made under sub-section (ii) may be for the life of the person to whom it relates or for a term to be stated in the order, and may at any time with the advice and consent of the Resident be revoked, cancelled, or varied by the Ruler of the State.

(iv) 'Districts' and 'mukims' shall mean the districts and mukims duly notified under section 6 of the Land Code."

Section 4 of the Enactment prohibits any person ordered to reside in a district, mukim, town or village from entering into another district, mukim, town or village.

The Enactment being an Enactment of the then Federated Malay States, applied only to the States of Perak, Selangor, Negeri Sembilan and Pahang.

In 1948 by the Restricted Residence (Amendment) Ordinance 1948, the Enactment was extended throughout the Federation. Section 2A was also added to the principal Enactment and this section empowered the Ruler in Council in the Malay States and the High Commissioner in Council in the Settlements, to direct that any person named in an order made by it be placed under police supervision. I do not wish to read out the provisions of section 2A since in my view, we are not concerned directly with them

The Federal Constitution came into force on 31st August, 1957 — Merdeka Day.

In 1958, under L.N. 132 dated 15th May, 1958, the Yang di-Pertuan Agong in exercise of the powers conferred by clause (4) of the article 162 of the Federal Constitution modified section 2 of the Enactment by substituting the words "Mentri Besar or Chief Minister" for the word "Resident". It also deleted the words "with the advice and consent of the Resident" in sub-section (ii) and added the words "or the Governor" after the words "the Ruler" wherever the latter words appear in the section.

In August 1959 by L.N. 278, the Yang di-Pertuan Agong further modified the Enactment with the result, *inter alia*, that the power to make an order for restricted residence under section 2 and for police supervision under section 2A is taken away from the Mentri Besar and Chief Minister and given to the Minister.

The Minister *vide* L.N. 279 dated 20th August, 1959 delegated his powers conferred by the Enactment to the Mentri Besar or Chief Minister provided that the Mentri Besar or the Chief Minister shall not exercise any such power in respect of any such person who is not ordinarily resident in a State or in respect of any place outside the State.

In 1964 by L.N. 9 dated 6th January, 1964, the Minister withdrew from the Mentri Besar and Chief Minister the power given by sub-section (iii) of section 2 to revoke, cancel or vary an order made under the Enactment.

It was pointed out to us that the Enactment has:—

(i) no provisions for informing the person concerned of the grounds of his arrest and detention,

(ii) no provision for producing him before a magistrate or for an enquiry at which the detained person could meet the allegations against him,

(iii) no provisions for review,

(iv) no provision for limitation of the period of detention which may be for the whole term of the individual's natural life.

It was therefore urged on behalf of the applicant that section 2 read with section 4 of the Enactment are inconsistent with the provisions of clause (1), (3) and (4) of article 5 and of clause (2) of article 9 of the Federal Constitution and in fact in law equivalent to the *lettres de cachet* of pre French Revolution.

I will now set out the provisions of the Constitution referred above and also those of article 162(1).

Article 5 clause (1) provides that no person shall be deprived of his life or personal liberty save in accordance with law. Clause (2) of that article provides that where a complaint is made to a High Court or to any judge thereof that a person is being unlawfully detained, the court or the judge shall enquire into the complaint and unless satisfied that the detention is lawful, shall order him to be produced before it and release him.

Clause (3) requires that a person after arrest must be informed as soon as may be of the grounds of his arrest.

Clause (4) provides that where a person is arrested and not released he shall without any unreasonable delay and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a

magistrate and shall not be further detained in custody without the magistrate's authority.

Article 9(2) reads as follows:—

"Subject to clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof."

Article 162(1) reads as follows:—

"Subject to the following provisions of this article and article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and subject to any amendments made by Federal or State law."

It is true that the Enactment has no provisions for informing the person concerned of the grounds of his arrest and detention and for producing him before a magistrate or for an inquiry at which the detained person could meet all the allegations against him.

Under article 162(1) the Yang di-Pertuan Agong could have made modifications to the Enactment in order to bring its provisions in line with the relevant provisions of the Constitution and it is too late for him to do so now.

In my view, the Enactment is not unconstitutional merely because it does not have provisions similar to those of article 5 of the Constitution and in my view therefore the provisions of article 5 which are relevant should be read into the provisions of the Enactment.

The Privy Council in *Surinder Singh Kanda* v. *The Federation of Malaya* [1] (at p. 171) deals with the conflict between the provisions of the Police Ordinance, an existing law dealing with the powers of the Commissioner of Police and the provisions of the Constitution, as to the duties of the Police Service Commission, and their Lordships said:—

"But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it necessary for the court to do so under article 162(6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution."

As I said, the problem before us may be solved by reading into the Enactment the relevant provisions of the Constitution. This has been done in the case of *Aminah* v. *Superintendent of Prison Pengkalan Chepa, Kelantan* [2] where Wan Suleiman J. expresses the following view, with respect, I would say, correctly:—

"However, it would be absurd to suggest that the absence of any provision similar to article 5(3) would make the whole Enactment void. The proper approach is for the court to apply article 162(6) which reads:—

'Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution'."

The court, therefore in this case must read into it the provisions of article 5(2) and (3) of the Constitution with the result that the applicant must be informed as soon as may be of the ground of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice and if not released he shall without reasonable delay and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without a magistrate's authority.

What is going to happen when he is brought before a magistrate? In my view the magistrate concerned has to accept the warrant of arrest and detention signed by a Mentri Besar as sufficient authority for him to order further detention and if the validity of the order is challenged then the matter may be brought before the High Court as has been done in this particular case. The answer to the question posed to us would therefore be in the negative.

It was also urged before us that the Minister could not in law delegate the powers conferred by the Enactment upon him, to another person because the Minister does not have the power to delegate the subjective satisfaction of believing that any person should be required to reside in any particular district or mukim, which is a pre-condition to the exercise of the power to issue an order for arrest and detention, and further that the only power which the Minister may delegate to the Mentri Besar assuming he had it, is the power to issue and sign the warrant after the Minister himself has indicated his subjective belief, which is the condition precedent to the exercise of the power.

I will now refer to the relevant sections of the Delegation of Powers Ordinance 1956 and the instrument of delegation in L.N. 279 dated 20th August, 1959. Section 5 of the Delegation of Powers Ordinance 1956 reads as follows:—

"Where by any written law a Minister is empowered to exercise any powers or perform any duties, he may, subject to the provisions of section 11 of this Ordinance, by notification in the *Gazette* delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office."

L.N. 279 of 1959 reads as follows:—

"In exercise of the powers conferred by section 5 of the Delegation of Powers Ordinance, 1956 the Minister of the Interior and Justice hereby delegates to the Mentri Besar or Chief Minister of a State the exercise of the powers conferred upon the Minister by sections 2, 2A and 5 of the Restricted Residence Enactment of the Federated Malay States as extended to apply throughout the Federation by the Restricted Residence (Extended Application) Ordinance, 1948:

Provided that the Mentri Besar or Chief Minister shall not exercise any such power in respect of any person who is not ordinarily resident in the State or in respect of any place outside the State."

In the course of preparing this judgment the Privy Council case of *Mungoni* v. *Attorney-General of Northern Rhodesia* [3] was brought to my notice. In that case the Governor of Northern Rhodesia was given power under regulation 16 of the Emergency Powers Regulation 1956 of that territory to direct that any person be detained, whenever he was satisfied that was necessary for the purpose of maintaining public order and he was also given power under one of the regulations to depute any person to exercise all or any of the powers conferred upon him by these regulations. In exercise of that power the Governor delegated his power given by regulation 16 to a Provincial Commissioner. The provisions of that regulation and of the instrument of delegation are substantially similar to our section 5 of the Delegation of Powers Ordinance 1956 and L.N. 279 of 1959.

The Chief Justice of the territory held the view that that instrument was a valid delegation to the Provincial Commissioner and the power to make a detention order but no delegation at all the duty of the Governor to be satisfied and that, that duty remained with the Governor himself. In the key passage of the judgment the learned Chief Justice said this:—

"The delegation set out in Government Notice 221 of 1956 is good as far as it goes. The Provincial Commissioner can make a detention order — but only when the Governor is satisfied that it is necessary in terms of regulation 16(1): and no delegation of the duty of satisfying himself has been made by the Governor. Without the step of 'satisfying' being taken, a detention order is *ultra vires*."

I believe this is what counsel for the applicant intended to convey to us in his address but unfortunately for him the Privy Council did not agree with the reasoning of the learned Chief Justice. For at page 350 of the report their Lordships say as follows:—

"While their Lordships share with the Chief Justice his concern for the liberty of the subject they cannot agree with this line of reasoning. The power and the duty under regulation 16(1) are so interwoven that it is not possible to split the one from the other — so as to put the duty on one person and the power in another. Whosoever exercises the power he it must be who has to carry out the duty. It seems clear to their Lordships that, if the Governor has any authority at all to delegate his functions under regulation 16(1), he must be able to delegate both the power and duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself."

Further in the judgment their Lordships say as follows:—

"The power of the Governor to make a detention order can only be exercised when he is 'satisfied' that it is necessary. The requirement that he is to be satisfied — though in one sense a duty — is nevertheless a condition or limitation on the exercise of the power. And when regulation 47 authorises the Governor to delegate the power to any person it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties. There are many powers in the Emergency Regulations to which the like applies. They start off 'Whenever the Governor is satisfied' or 'If it appears to the Governor,' or the like. Mr. Mallalieu was forced to say that, whenever such a condition or limitation was expressed, the Governor had to fulfil it himself and could not delegate it. Their Lordships cannot accept this view."

In my view the provisions dealing with the delegation of powers are practically on all fours with those provisions subsisting in Northern Rhodesia and therefore on the line of reasoning of their Lordships of the Privy Council I would say that the Minister has delegated his power and duty under the Enactment to the Mentri Besar and the Mentri Besar may therefore exercise all the power and duty given to the Minister by section 2 of the Enactment.

**Ong Hock Thye C.J. (Malaya):** I am greatly indebted to my learned colleagues for a sight of their judgments in draft before I reached any firm conclusions in this matter. I am no less indebted to the learned Solicitor-General for his submission in writing which highlights with precision the relevant matters to be considered before we can give a categorical answer to the question posed in this reference.

The facts have been fully set out elsewhere and need no repetition by me. On the law, too, certain conclusions have my full endorsement. To them I shall refer only in the briefest of terms. In the first place, I agree that article 9 of the Constitution has no application or relevance in the instant case. "The right to move freely throughout the Federation and to reside in any part thereof" is not an absolute and unqualified right, for it is expressed to be subject to "any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders". The simplest example of a lawful restriction on unlimited freedom of movement is imprisonment after conviction for a criminal offence. A threat to public order may be met, in a variety of ways, by lawful action. In any event, for present purposes at least, article 4(2) of the Constitution lays down, in general terms, that

"the validity of any law shall not be questioned on the ground that it imposes restrictions on the right mentioned in article 9(2) but does not relate to the matters mentioned therein".

In the second place, with all respect to learned counsel for the applicant, I would express my concurrence with the reasons elsewhere given for holding that the powers which devolved on the Mentri Besar of Johore had been lawfully delegated to him. There can be no question that, in issuing the warrant under section 2(i) of the Restricted Residence Enactment, the Mentri Besar was acting properly within the powers exercisable by him.

In the third place, I agree that, since article 4 speaks only of laws passed after Merdeka Day, the validity or otherwise of the pre-Merdeka Restricted Residence Enactment will have to be considered solely by reference to article 162. The point is summed up most admirably by the learned Solicitor-General as follows:—

"As to post-Merdeka law, the Constitution is supreme and if any of that law is inconsistent with the provisions of the Constitution, to the extent of such inconsistency that law shall be void — article 4(1). But as regards pre-Merdeka law, such law shall continue to be in force until repealed; in the meantime its continuity and enforceability is subject to modification, firstly, by a Legislative Act or Enactment or, secondly, by process of judicial interpretation, the executive order of the Yang di-Pertuan Agong to modify the same having expired — article 162(1) and (6). It must be noted that article 162 does not use the expression that the pre-Merdeka law shall be void to the extent of the inconsistency but, instead, it expressly states that the law shall continue to be in force."

In the fourth place, it is our unanimous view that the only possible area of conflict is between the Enactment and article 5 of the Constitution, which has already been quoted elswhere *in extenso*. The learned Solicitor-General concedes that what I would describe as safeguards against arbitrary executive acts infringing fundamental personal liberties are enshrined in clauses (2), (3) and (4) of article 5, but are found nowhere in the Restricted Residence Enactment. He further concedes, with his usual candour, that these "safeguards provided in article 5 in favour of citizens must be complied with if the exercise of an executive act pursuant to the power conferred by law is to be made valid".

But, it is submitted, article 5 remains inviolate notwithstanding that the Restricted Residence Enactment provides no such safeguards. The rationale is to be found in the provisions of article 162, clause (1) of which declares existing laws as continuing in force, until repeal, read with the further provision in clause (6) that "any court or tribunal applying the provisions of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution". It is argued, therefore, that clauses (3) and (4) must be held as imported into the Enactment.

At the outset we were inclined to think that the learned judge at first instance might well have given his own findings of fact before referring the question of law to this court. On reflection, however, I respectfully agree with him on the course he had taken.

The application was made on five grounds, namely, that:—

"(i) The provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void.

(ii) The said warrant of arrest and detention was made without adequate consideration and is not made *bona fide*, and is of no effect.

(iii) The abovenamed applicant was not supplied with the grounds for his arrest and/or detention either timeously or at all.

(iv) The applicant does not know the grounds of his detention and has not been permitted any opportunity to make any representations concerning them nor is he being offered any opportunity to know the said grounds adequately for the purpose of making any representation.

(v) The applicant has not been informed of any inquiry which may have been held by the Honourable the Mentri Besar of Johore prior or subsequent to the applicant's detention."

The first is the question of law under reference. The rest are pure questions of fact, about which actually no controversy survives to this court.

As to ground (ii) the onus of proving lack of *bona fides* rests on the applicant; it was not discharged. In his letter of September 16, 1968 the Honourable the Mentri Besar had given an explanation for issuing the warrant of arrest. The court cannot go behind his explanation. I do not need to quote authorities in support of this proposition.

On the point common to grounds (iii) and (iv) suffice it to say that the warrant of arrest and the affidavit of D.S.P. Godwin Anthony speak for themselves. While it is true that the court will and should assume that the applicant's allegations are true as to any matter which remains ambiguous, the fact remains that the applicant's solicitors were supplied the grounds of his arrest and detention by the Mentri Besar's letter of September 16, 1968. Nor is it entirely correct to say that the applicant "has not been permitted any opportunity to make any representations". They could have been presented in writing and it has not been alleged that this had been done. Had the applicant requested

to be heard in person or by counsel at any proposed inquiry there is no ground for supposing that he would have been denied. Indeed, the Mentri Besar's letter, in paragraph 3, appears to indicate that their appearance would not be objected to at a hearing in closed session.

Ground (v) was not denied. It is true that, before the arrest and detention, there was no enquiry of which the applicant had been given notice, affording him an opportunity to be defended by a legal practitioner of his own choice or for representations to be made on his behalf. Such action, however, is nothing out of the ordinary. It is an everyday occurrence for arrests of persons to be made after investigations of which they have no prior notice or even suspicion. As to an inquiry subsequent to detention, perhaps the matter has remained in abeyance merely because the motion herein was filed before any further steps could be taken to hold such enquiry. The learned Solicitor-General concedes, I believe, that the applicant is entitled to an inquiry at which he would have full opportunity of making representations.

Bearing in mind that the validity of the Restricted Residence Enactment is now challenged only for the first time and that the application of the Enactment requires such modification as may be necessary to bring it into accord with the provisions of (article 5 of) the Constitution, it is not surprising that want of proper guidance to the authorities has led to uncertainties about this Enactment. There was and is a *lacuna* in the law which requires supplementing. Clauses (3) and (4), in my judgment, must be deemed to be incorporated in the Enactment. My brother Gill has dealt fully in his judgment with the question of their practical application. On this point I need add nothing more. In the result, I agree with my learned colleagues that the answer to the question posed should be in the negative.

**Suffian F.J.:** The Mentri Besar, Johore (respondent) on 6th July, 1968, issued a warrant for the arrest and detention of Assa Singh (applicant). The warrant was issued under section 2(i) of the Restricted Residence Enactment (F.M.S. Cap. 39) which applies in Johore. (I shall refer to it throughout as the Enactment). On 1st September Mr. Godwin Anthony, Acting Deputy Superintendent of Police, arrested the applicant who is still under detention. The Mentri Besar intended to exile the applicant to another district, but has not done so probably because of these proceedings.

On 5th October Dato' David Marshall on Assa Singh's behalf started these proceedings in the High Court, Johore Bahru, moving the court to issue an order of *habeas corpus* directing the Mentri Besar to produce the applicant before the court and to show cause why the applicant should not be set at liberty. The application was made under article 5 of the Malaysian Constitution and Chapter XXXVI of the Criminal Procedure Code (Cap. 6).

Dato' Marshall contends that the applicant's detention and threatened exile are illegal and wrongful on five grounds which have been stated elsewhere today. I shall mention only the first ground, namely, that the provisions of the Restricted Residence Enactment authorizing detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void.

When this matter came up before the High Court Dato' Marshall submitted that the first ground necessarily involved the determination of the effect of certain provisions of article 162 of the Federal Constitution, but he nevertheless asked the High Court itself to determine the question and not refer it to the Federal Court. The learned Legal Adviser on behalf of the Mentri Besar agreed. Notwithstanding this, the learned judge on 13th November, acting under section 48 of the Courts of Judicature Act No. 7 of 1964, stayed the proceedings and referred the following question for the determination of this court:—

> "Are the provisions of the Restricted Residence Enactment authorizing detention and/or deprivation of liberty of movement contrary to the provisions of the Federal Constitution and therefore void?"

It will be observed that the question is in two parts: first, we are asked to say whether the Enactment is contrary to the Constitution and, secondly, if so whether it is void. As will be seen in a moment, in my view a pre-Merdeka law which is inconsistent with the Constitution is not necessarily void.

It should be stressed that we are not here to decide on the legality or otherwise of the applicant's detention. That will have to be decided eventually, but in the High Court after the disputed facts have been decided and in the light of the law set out as we see it.

The learned Solicitor-General, counsel here for the Mentri Besar, first submits that the Federal Court has no original jurisdiction to determine the question posed at this stage (though it will have jurisdiction to determine it later by way of appeal) because, he says:—

(a) the Federal Court has original jurisdiction to determine a constitutional question, if the question is "as to the effect of any provision of the Constitution". In this case, the question does not say which article requires interpretation; and

(b) the High Court seems to have asked the Federal Court to interpret article 162, but

this article gives power to the High Court to modify the Enactment being pre-Merdeka law if it is inconsistent with the Constitution so as to bring it into accord with the Constitution.

But when pressed, the learned Solicitor-General agreed to drop this objection.

I think that he was right to do so. The Federal Court is principally an appellate court but, in addition, it has three other kinds of jurisdiction:—

(a) advisory,

(b) original and

(c) referral.

Our advisory jurisdiction is conferred by article 130 of the Federal Constitution under which His Majesty may refer to us for our opinion any question as to the effect of any provision of the Constitution. Our original jurisdiction, which is exercised to the exclusion of any other court, is conferred by clause (1) of article 128 under which we may determine:—

(a) any question whether Federal or State law is invalid on the ground that it is outside the competence of the legislature concerned; and

(b) disputes on any other question between States or between the Federation and any State.

Our referral jurisdiction is conferred by clause (2) of article 128 which provides:—

"Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction . . . . to determine the question and remit the case to the other court to be disposed of in accordance with the determination."

It is clear in my judgment that, first, the question posed by the learned judge is before us not in exercise of our original, but of our referral jurisdiction and, secondly, the question posed involves determining the effect of certain provisions (though not fully specified by the learned judge) of the Constitution on the Enactment.

I now turn to the substance of this matter.

The Restricted Residence Enactment is a pre-Merdeka law. It is a short and simple one. It gives drastic powers to the executive to exile any person to any part of the Federation. As Dato' Marshall says, it may be used to exile any person who wears a grey tie because the executive does not like him to wear a grey tie.

The applicant was arrested under sub-section (i) of section 2. Section 2 reads as follows:—

"(i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim or should be prohibited from entering into any particular district or districts or mukim or mukims the Minister may issue an order . . . . for the arrest and detention or, if he is already in prison, for the detention of such person.

(ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order . . . . that from a date to be stated in such order, such person do reside in such district or mukim as may be specified in the order or do not enter into such district or districts or mukim or mukims as may be so specified.

(iii) An order made under sub-section (ii) may be for the life of the person to whom it relates or for a term to be stated in the order, and may at any time be revoked, cancelled, or varied by the Minister.

(iv) 'Districts' and 'mukims' shall mean the districts and mukims duly notified under section 6 of the Land Code."

It will be observed that the following steps may be taken under the above section:—

(a) *First step*

The Minister considers written information and makes or causes to be made such enquiry as he may deem necessary. If then it appears to him that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim or should be prohibited from entering any particular district or mukim, the Minister may take the next step.

(b) *Second step*

The Minister issues an order for the arrest and detention of that person. This order, however, is only a preliminary order.

(c) *Third step*

The Minister then makes a second order, ordering the person to reside in a specified district or mukim or not to enter specified districts or mukims. The order may be for life or for a specified term and may be revoked, cancelled or varied by the Minister. It is to be noted that this second order may be made after such further enquiry as the Minister may deem necessary. In other words, an enquiry after arrest is optional.

I now summarise briefly the other provisions of the Enactment. Without prejudice to section 2, the Minister may under section 2A order any person to be placed under police supervision for a period not exceeding five years and may renew such order for a further period not exceeding one year at a time.

Section 3 provides that when an order of restricted residence has been made under section

2(ii) or of police supervision under section 2A, the person subject to the order must be taken before a prison official, who shall inform him of the terms of the order and shall deliver to him a copy of it and require him to state the place in which, consistently with the order, he desires in the immediate future to reside. Then the official must hand him over to a police officer, who shall then convey him to the place where the person wishes to reside and there release him.

Before going into the heart of the matter, I shall deal first with two arguments.

Dato' Marshall's first argument is this. He points out that the Constitution, by clause (4) of article 162, permits the Yang di-Pertuan Agong within a period of two years beginning with Merdeka Day to modify any pre-Merdeka law so as to bring it into accord with the provisions of the Constitution. An order has been made under this clause, namely, Legal Notification No. 278 of 20th August, 1959. This order substituted the word "Minister", a Federal authority, for the word "Resident", a State authority, and generally transferred powers previously vested in a State authority to the Federal Minister. Dato' Marshall submits that this is *ultra vires*. With respect I disagree, and hold that the modifications made by L.N. 278 of 1959 were perfectly constitutional. Before independence "restriction of residence" was a matter with respect to which the Federation had legislative but the States executive authority, see the proviso to clause 86 of, and item 43 of the Second Schelule to, the Federation of Malaya Agreement, 1948. But under the present Constitution there is in general no division of legislative and executive authority, so that if the Federation has legislative authority over a subject, the executive authority over that subject is also Federal, without prejudice to the power of the Federal authority to delegate, see clause (1) and (4) of article 80. Under the present Constitution, "restriction of residence" is wholly Federal, see item 3(c) of the Federal List in the Ninth Schedule. Accordingly it was perfectly proper for His Majesty to modify the Enactment to provide that executive powers under it shall be exercised by a Federal authority.

Dato' Marshall's other argument is this. If the modification made by His Majesty is constitutional, section 2 of the Enactment however gives power to the Minister to arrest and detain, whereas the applicant was arrested under a warrant signed by the Mentri Besar of Johore, Dato' Marshall points out that it is true that the Minister has, by L.N. 279 of 20th August, 1959, as amended by L.N. 9 of 6th January, 1964, delegated under section 5 of the Delegation of Powers Ordinance No. 56 of 1956, his power under section 2 (other than the power under sub-section (iii) of section 2 to revoke, cancel or vary an order made) of the Restricted Residence Enactment to the Mentri Besar, Johore, but he argues that the Minister's jurisdiction under section 2 consists of two things:—

(a) a duty to satisfy himself that there are reasonable grounds for believing that a person should have his residence restricted; and

(b) power to issue a warrant for his arrest and detention.

He submits that the Delegation of Powers Ordinance, 1956, allows the Minister to delegate only his power to issue a warrant for arrest and detention, but not his duty to form a subjective belief that there are reasonable grounds for restricting a person's residence.

In the course of the argument Dato' Marshall abandoned this objection, I think rightly for the reason stated by my Lord President and by my brother Raja Azlan Shah.

I now come to the meat of Dato' Marshall's arguments.

At the outset I should say at once that Dato' Marshall cannot (and he does not) rely on article 9(2) which reads:—

> "Subject to . . . . any law relating to the security of the Federation or any part thereof, public order, public health or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof."

It is true that the above clause guarantees the freedom of movement of the citizen (the applicant is a citizen), but this freedom is not absolute. It is subject to any law relating to public order and in my view there is no doubt that the Enactment relates to public order. In any event, whether or not it does so is immaterial because clause (2)(a) of article 4 expressly provides:—

> "The validity of any law shall not be questioned on the ground that . . . . it imposes restrictions on the right mentioned in article 9(2) but does not relate to the matters mentioned therein."

Central to the question posed to us is article 5 which provides:—

> "(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest

and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

(5) Clauses (3) and (4) do not apply to an enemy alien."

It is common ground that there are no provisions in the Enactment providing:—

(a) that a person arrested under it shall be informed as soon as may be of the grounds of his arrest;

(b) that he shall be allowed to consult and be defended by a practitioner of his choice;

(c) that if not released he shall without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey), be produced before a magistrate;

(d) that he shall not be further detained in custody without the magistrate's authority; and

(e) that the person arrested is entitled to an enquiry.

Dato' Marshall submits that all the above rights are guaranteed to his client by article 5. He says that right (e) is to be inferred from the words underlined in clause (3) of article 5. (He expressly disclaims any right to a trial.)

The learned Solicitor-General concedes that the Enactment is silent regarding the above rights and that the applicant is entitled under that article to an enquiry — but argues that it would be mere surplusage for any law to re-enact within its text these constitutional safeguards because they are in any event to be read into any law; and that in the case of any pre-Merdeka law, if there is any provision in it which is inconsistent with the Constitution, the law is not voided but the court should exercise its power under clauses (6) and (7) of article 162 to modify the law to bring it into accord with the Constitution. He submits that that is what the court should do here.

Dato' Marshall retorts that in the instant case it is impossible for the court to so modify the Enactment as to bring it into accord with the Constitution because so doing involves a complete re-writing of the Enactment.

My conclusions are as follows.

It is no doubt true that the Enactment does not contain any of the rights guaranteed by article 5. It does not, however, purport to deny any of these rights; it is merely silent. That does not, in my opinion, make the Enactment contrary to the provisions of the Constitution. This answers the first part of the question.

Coming now to the second part of the question, given that the Enactment does not say anything about the rights guaranteed to an arrested person by article 5, and even assuming, therefore, that it is contrary to the Constitution is the Enactment then void? The answer is to be found in articles 4 and 162.

Clause (1) of article 4 provides:—

"This Constitution is the supreme law of the Federation any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Clauses (1), (4), (6) and (7) of article 162 provides as follows:—

"(1) Subject to the following provisions of this article . . . . the existing laws [i.e., in force immediatel before Merdeka Day] shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and subject to any amendments made by Federal or State law."

"(4) The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law, other than the Constitution of any State, as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution; but before making any such order in relation to a law made by the Legislature of a State he shall consult the Government of that State." (*Repealed by Act 25 of 1963, section 8, but without prejudice to the operation of any order made under the clause.*)

"(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

"(7) In this article 'modification' includes amendment, adaptation and repeal."

The first part of clause (1) of article 4 provides that the Constitution shall be the supreme law of the land and one would therefore expect it to follow that any law which is inconsistent with the Constitution is void, at least to the extent of the inconsistency, but the Constitution, as the learned Solicitor-General points out, draws a distinction between:—

(a) pre-Merdeka law and

(b) post-Merdeka law

which is inconsistent with the Constitution.

The constitutional treatment of the two categories of inconsistent laws is quite different. Article 4(1) provides that any post-Merdeka law which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

Article 162 on the other hand provides that any pre-Merdeka law such as the Enactment shall coninue in force on and after Merdeka Day. That is so even if it is inconsistent with the Constitution. It may, however, be repealed by the appropriate legislature. Until so repealed it may be modified without going to Parliament, simply by order of His Majesty within a period of two years beginning with Merdeka Day for the purpose of bringing its provisions into accord with the Constitution. If it has not been modified by His Majesty under article 162 or if it has not been modified otherwise, then under clause (6) any court applying its provision must apply it with the necessary modifications to bring it into accord with the Constitution.

As Lord Denning said when giving the advice of the Privy Council in *B. Surinder Singh Kanda* v. *The Government of the Federation of Malaya* [1] at page 171:—

"It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission), the Yang di-Pertuan Agong could himself (under article 162(4)), have made modifications in the existing law within the first two years after Merdeka Day. . . . but the Yang di-Pertuan Agong did not make any modification in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the court to do so under article 162(6). It appears to their Lordships that there cannot, at one and the same time, be two authorities each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this type between existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. . . ."

There is not a word here to say that the offending inconsistent part so infects the pre-Merdeka law that it becomes wholly void. Let it be noted that in *Kanda* [1] the material pre-Merdeka law, namely, the Police Ordinance, was not merely silent; it openly conflicted with the Constitution and yet it was not held to be void.

Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it must be applied with modifications to bring it into accord with the Constitution. To bring it into accord with the Constitution, there must be read into the Enactment the constitutional rights conferred on an arrested person by article 5.

In my judgment, the rights conferred by clauses (3) and (4) of that article apply where a person is arrested under the Enactment. In this, I respectfully disagree with Sutherland J. in *Chia Khin Sze* v. *Mentri Besar, State of Selangor* [4] and agree with Wan Sulaiman J. in *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan.* [2]

What are these rights?

First, where a person is arrested under the Enactment he must be informed as soon as may be of the grounds of his arrest.

Secondly, where a person is arrested under the Enactment he must be allowed to consult and be defended by a legal practitioner of his choice.

But I see nothing in the article which gives him a right to an enquiry All that clause (3) of article 5 says is that he shall be allowed to consult and be defended by a legal practitioner of his choice. To infer from this that he is entitled to an enquiry is as absurd as inferring from my right to defend myself with my fists that I am entitled to be attacked.

Clause (1) of article 5 merely states that no person shall be deprived of his personal liberty save in accordance with law. It does not say that no person shall be deprived of his personal liberty save after an enquiry. I yield to no one in my concern for the liberty of the subject, but if the makers of the Constitution had intended to alter the pre-Merdeka law (which may authorise the detention of any person without giving him the right to an enquiry), they would have used explicit language.

Perhaps for practical purposes the learned Solicitor-General is right to concede that the applicant is entitled to an enquiry. After all, persons who are supposedly more dangerous to the community and are detained under any law against subversion or made in consequence of a proclamation of emergency are given the benefit of an enquiry. See the Internal Security Act, No. 18 of 1960.

Thirdly, where a person is arrested under the Enactment and not released, he must without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey), be produced before a magistrate.

Fourthly, he shall not be further detained in custody without the magistrate's authority.

There would be no difficulty about reading into the Enactment the first two rights mentioned above, namely, the right of the applicant to be informed of the grounds of his arrest and the right to be allowed to consult and be defended by a legal practitioner of his choice.

At first I thought that there would be practical difficulties about reading the third

and fourth rights into the Enactment, because I considered that if the arrested person was brought before a magistrate and he did not challenge the legality of his arrest, the magistrate would not know whether to remand him in custody or on bail. I thought that there was a *lacuna* in the law regarding this important matter, that there was nothing corresponding to the rather elaborate provisions regarding persons arrested under the Prevention of Crime Ordinance No. 13 of 1959 and the Vagrants Act No. 19 of 1965, and that it was up to Parliament (not the court) to fill in the *lacuna*. But since writing my judgment I have had the advantage of reading the judgment of my brother Gill in draft and I agree with him that there would be no practical difficulties. When the arrested person is brought before the magistrate, he cannot there challenge the legality of his arrest because the magistrate has no jurisdiction to decide the question. If the law is silent on bail, then the arrested person is not entitled to bail and the magistrate must therefore, recognising the legality of the arrest, order the arrested person to be remanded in custody, but ensure that any further action necessary under the Enactment is not unduly delayed. This he may do by having the arrested person brought up before him every week, as in the case of an ordinary offender, and asking questions of the officer in charge of the case.

I cannot conclude this matter without, however, observing that it would be best to avoid doubt and confusion by the legislature stepping in and amending the Enactment to guide magistrates by precise provisions regarding post-arrest procedure on the lines of the Prevention of Crime Ordinance or the Vagrants Act or in some other way.

To sum up, in my judgment, the Restricted Residence Enactment is silent as regards the four rights guaranteed by article 5 to a person arrested under the Enactment, namely, the right to be informed as soon as may be of the grounds of his arrest, to be allowed to consult and be defended by a legal practitioner of his choice, and, if not sooner released, to be produced without unreasonable delay and in any case within 24 hours (excluding the time of any necessary journey), before a magistrate and not to be further detained without the magistrate's order. Such further detention must be in accordance with law, which law need not give him a right to an enquiry. Silence of the Enactment regarding the four rights does not make it contrary to the Constitution. Even if the Enactment is contrary to the Constitution, the Enactment is not void. The four rights should be read into the Enactment.

Gill F.J.: The applicant was arrested on and has been under detention since 1st September, 1968 in pursuance of a warrant issued by the Mentri Besar, Johore (the respondent) on 6th July, 1968 under section 2(i) of the Restricted Residence Enactment, F.M.S. Cap. 39 (hereinafter referred to as "the Enactment"). This was the first step in the process of the making of an order under section 2(ii) of the Enactment that the applicant do reside in such district or mukim as may be specified in such order or do not enter into such district or districts or mukim or mukims as may be so specified.

Before any such order under the Enactment was made a motion on behalf of the applicant was filed in the High Court at Johore Bahru on 3rd October, 1968 for an order in the nature of *habeas corpus* to direct the Mentri Besar to produce the applicant before the court and to show cause why he should not be set at liberty. The ground on which the order of the High Court was sought was that the applicant's detention and his threatened exile to Pengerang in Johore were illegal and wrongful for the following reasons:—

"(i) The provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void.

(ii) The said warrant of arrest and detention was made without adequate consideration and is not made *bona fide*, and is of no effect.

(iii) The abovenamed applicant was not supplied with the grounds for his arrest and/or detention either timeously or at all.

(iv) The applicant does not know the grounds of his detention and has not been permitted any opportunity to make any representations concerning them nor is he being offered any opportunity to know the said grounds adequately for the purpose of making any representation.

(v) The applicant has not been informed of an inquiry which may have been held by the Honourable the Mentri Besar of Johore or subsequent to the applicant's detention."

When the matter came up for hearing before the learned judge at Johore Bahru the question which naturally arose from the nature of the motion was whether the provisions of the Enactment under which the applicant was detained were repugnant to any of the provisions of the Federal Constitution and therefore void. The basis of the motion is clause (1) of article 4 of the Constitution, which reads as follows:—

"(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

The learned judge, instead of deciding the question himself, as he undoubtedly had the power to do under section 48 of the Courts of Judica-

ture Act, 1964, has referred it under the same section to this court for determination. The question as framed by his Lordship is:—

"Are the provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement contrary to the provisions of the Federal Constitution and therefore void?"

The learned Solicitor-General appearing on behalf of the Mentri Besar took the preliminary point that the learned judge should have dealt with the question himself instead of referring it to this court. He conceded, however, that the matter was properly before this court. This is so because of clause (2) of article 128 of the Constitution, which reads as follows:—

"(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination."

The Enactment under which the Mentri Besar made the order for the applicant's detention, being an Enactment of the former Federated Malay States, originally applied only to the four States comprised in that Federation. The Restricted Residence (Extended Application) Ordinance, 1948 (No. 4 of 1948) extended its operation throughout the Federation with certain modifications, and some further amendments were made to it before Merdeka. After the coming into force of the Federal Constitution on 31st August, 1957, by Legal Notification No. 132 of 15th May, 1958 the Yang di-Pertuan Agong in the exercise of the powers conferred by clause 4 of article 162 of the Constitution modified section 2 of the Enactment by substituting the words "Mentri Besar or Chief Minister" for the word "Resident". The Enactment was further modified by Legal Notification No. 278 of 20th August, 1959 so as to vest the power to make the order for restricted residence under section 2 of the Enactment in the Minister. By Legal Notification No. 279 of 20th August, 1959 the Minister, acting under the powers conferred under section 5 of the Delegation of Powers Ordinance, 1956 delegated his powers under the Enactment to the Mentri Besar or Chief Minister of the State.

It was argued before us by Dato' David Marshall on behalf of the applicant that the amendments and modifications made to the Enactment were *ultra vires* the powers under which they were purported to be made in that such amendments and modifications, far from bringing the provisions of the law into accord with the provisions of the Constitution, were in direct contravention of certain provisions of the Constitution. I do not agree. The Enactment, in its present form may be said to be inconsistent with the Constitution, but that does not mean that the amendments and modifications which were made to it were not lawfully made unless they were *ultra vires* the powers under which they were in fact made. The effect of all those modifications and amendments was nothing more than this, that the Enactment was made applicable throughout the Federation in 1948 and that subsequently the power to make the order which originally vested in the Resident was vested in the Minister who delegated his power in accordance with the law to the Mentri Besar or the Chief Minister of each State.

The ultimate question to be decided is whether the provisions of the Enactment under which the applicant is held in detention and is likely to be exiled to a place other than the place of his residence before his detention are inconsistent with the Constitution. Section 2 of the Enactment with all the amendments up to date reads as follows:—

"2. (i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim or should be prohibited from entering into any particular district or districts or mukim or mukims the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison, for the detention of such person.

(ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in such order, such person do reside in such district or mukim as may be specified in the order or do not enter into such district or districts or mukim or mukims as may be so specified.

(iii) An order made under sub-section (ii) may be for the life of the person to whom it relates or for a term to be stated in the order, and may at any time be revoked, cancelled, or varied by the Minister.

(iv) 'Districts' and 'mukims' shall mean the districts and mukims duly notified under section 6 of the Land Code"

It is to be observed that section 2 of the Enactment not only confers on the Minister the power to order the arrest and detention of any person but also imposes on him the duty to satisfy himself that there are reasonable grounds for believing that such person should have his residence restricted. The Minister by Legal Notification No. 279 of 20th August, 1959 delegated to the Mentri Besar or Chief Minister of a State the exercise of the powers conferred upon him by section 2 of the Enactment. Such delegation was made under section 5 of the Delegation of Powers Ordinance, 1956 which reads as follows:—

"5. Where by any written law a Minister is empowered to exercise any powers or perform any duties,

he may, subject to the provisions of section 11 of this Ordinance, by notification in the *Gazette* delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office."

It was argued by Dato' Marshall that the effect of L.N. 279 and section 5 of the Delegation of Powers Ordinance, 1956 is that the Minister can delegate only his power to issue a warrant of arrest and detention, and not his duty to form a subjective belief "that any person should be required to reside in any particular district or mukim", which is a condition precedent to the exercise of the power. I do not think that there is much substance in that argument. As was pointed out by the Privy Council in *Mungoni* v. *Attorney-General of Northern Rhodesia*,[3] power and duty are so interwoven that it is not possible to split one from the other so as to put the duty on one person and the power in another. Whoever exercises the power, he it must be who has to carry out the duty. A person cannot delegate the power to another and keep the duty to himself.

I now come to the substantial argument of Dato' Marshall on which hinges the answer to the question which has been referred to this court for determination. That argument is that the provisions of section 2 of the Enactment are inconsistent with the provisions of articles 9 and 5 of the Federal Constitution and therefore void to the extent of such inconsistency.

To deal with article 9 first, it provides as follows:—

"9. (1) No citizen shall be banished or excluded from the Federation.

(2) Subject to clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

(3) So long as under the Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by clause (2) in respect of movement and residence."

The order of detention made against the applicant was not intended to banish or exclude him from the Federation. Clause (1) of article 9 therefore does not apply. The effect of the order to be ultimately made by the Mentri Besar. if such an order is made, will be to deprive the applicant of his right to move freely throughout the Federation and to reside in any part thereof. The court, however, has no power to question the authority of the Parliament to pass any law relating to public order. I do not think there can be any doubt that the Enactment does relate to public order. Moreover, clause (2)(a) of article 4 provides:—

"(2) The validity of any law shall not be questioned on the ground that —

(a) it imposes restrictions on the right mentioned in article 9(2) but does not relate to the matters mentioned therein;"

Clearly, clause (3) of article 9 has no bearing on the question. I do not think, therefore, that there can be any room for argument that the Enactment is inconsistent with article 9 of the Constitution.

That brings me to article 5 which, as was submitted by the learned Solicitor-General as counsel for the respondent, to my mind quite rightly, contains the only provisions of the Constitution with which the Enactment may be said to be in conflict.

Article 5(1) says that "no person shall be deprived of his life or personal liberty save in accordance with law". The applicant here was arrested and detained on an order issued by the Mentri Besar under section 2(i) of the Enactment, which, being an existing law on Merdeka Day, is still in force by virtue of article 162(1) of the Constitution. The Enactment has not been repealed or amended by the appropriate authority as provided in that article, except for the amendment to which I have, referred above, nor has it been modified for the purpose of bringing it into accord with the provisions of the Constitution by an order of the Yang di-Pertuan Agong under article 162(4) of the Constitution, which has since been repealed. But the arrest of a person under section 2(i) of the Enactment is no different from the arrest of a person who is alleged to have committed a crime, and his detention, pending an order of exile under section 2(ii) of the Enactment, is no different from the remand in custody of an arrested person pending trial where bail is refused. There is nothing in the Constitution to say that every person who is arrested must as of right be granted bail. It cannot therefore be said that the arrest and detention of a person under section 2(i) of the Enactment, as opposed to his exile under section 2(ii) of the Enactment, is inconsistent with the provisions of article 5(1) of the Constitution, as opposed to the provisions of the other clauses in that article to which I shall come in a moment.

Dato' Marshall has argued that an order under section 2(i) of the Enactment is in fact and in law equivalent to the *"lettres de cachet"* of pre French Revolution days by which the king sentenced a subject without trial and without an opportunity of defence to imprisonment in a state prison or an ordinary goal, confinement in a convent or a hospital, transporta-

tion to the colonies, or relegation to a given place within the realm. This argument is based on the assumption that the Mentri Besar makes the order of his own motion. Any such assumption would be quite wrong.

In his letter of 10th September, 1968 written on behalf of the applicant to the Mentri Besar, Dato' Marshall urged that his client's constitutional rights to an enquiry be granted at an early juncture and that an opportunity be given to him to meet the allegations made against him. This is what the Mentri Besar said in his letter of 16th September, 1968 in reply to Dato' Marshall's letter:—

"I have been given to understand that action against Dato's clients has been carried out by the Johore Police after receiving several complaints disclosing proofs of offences (crimes) of (spreading) fear, extortion, extorting protection money, using criminal force and not less than three cases of robbery in which they the aforementioned (persons) have been involved. Unfortunately, these matters (cases) of crimes could not be tried in the court (of law) because the victims concerned were under fear of threats from them.

Nevertheless, the police in their investigation have obtained statement [statements] of not less than 20 victims of (the acts of) atrocity on the part of Dato's clients and they are prepared to give evidence in closed session (hearing) in connection with their (acts of) atrocity. For that reason, the police in their report have recommended to the Government that action be taken against Dato's clients pursuant to section 2(i) of the Enactment 'Restrictive Residence Cap. 39'.

The authorities after perusing the report and recommendation(s) by the police have been satisfied that there is sufficient proof to show that Dato' clients have been the elements who can damage (disturb) the peace of the society of Batu Pahat. Having had such proofs, the action under 'Order of Restriction' section 2(a)(i) Cap. 39 is therefore appropriate and reasonable. As Dato' is aware, no bail is provided (allowed) under the said Enactment."

In his affidavit filed in the proceedings before the High Court the Mentri Besar said:—

"I deny that I have made the said warrant of arrest and detention without adequate consideration. I also deny that the said warrant was not made in good faith.

Before I made the said warrant I was supplied with written information report and evidence obtained in an inquiry relating to Mr. Assa Singh s/o Teja Singh, conducted by officers who are responsible and experienced in making investigation and enquiry into matters of this kind. I have studied them carefully and I came to the conclusion that there were reasonable grounds to believe, and I did in fact believe, that Mr. Assa Singh s/o Teja Singh should be required to reside in a certain district other than Batu Pahat. Hence I made the said Order as a first step in the process of restricting the said Mr. Assa Singh s/o Teja Singh to reside in a certain district. But before I could issue an order restricting him to reside in another district he has applied to the court for release."

It is common knowledge that the Mentri Besar acts on written information which is supplied to him by the police and he issues a warrant after such enquiry as he may deem necessary. He is, however, not required to hold an enquiry at this stage to satisfy himself as to the truth of the allegations made against the person to be arrested. To say that he must hold such an inquiry before he can issue a warrant is to say that the police must submit their investigation papers to a magistrate who must hold an inquiry in order to permit the police to arrest a person who is alleged to have committed an offence. The police are empowered under the various laws to arrest a person who is alleged to have committed an offence. In certain cases they are required to lay an information before a magistrate in order to obtain a warrant for his arrest. But I can think of no provision of the law under which an inquiry by a magistrate is necessary before a person can be arrested with a view to his being prosecuted. I would, therefore, repeat that the arrest of a person and his detention pending an inquiry or a trial does not offend against any provision in terms or the spirit of the Constitution, so long as he is arrested in accordance with law.

The fundamental rights of a person who has been arrested are set out in clauses (3) and (4) of article 5 of the Constitution as follows:—

"(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority."

The Enactment contains no provisions similar to the provisions of clauses (3) and (4) of article 5 of the Constitution. But the absence of such provisions from the Enactment cannot mean that the Enactment is in conflict with the Constitution. What is required in such a case is to read into the Enactment the provisions of article 5 so as to bring it into accord with the Constitution. In this connection, I can do no better than to adopt the reasoning of the learned Solicitor-General in his written submission in the following words:—

"The provision of article 5 operates directly in favour of citizens even though the law contains no such provision. Further, the fact that a law contains the provisions of article 5 does not add much to its validity but the provisions of the article, if incorporated in the law, are merely declaratory of the Constitution and serve as an useful purpose of being a practical reminder to the law enforcement agency that certain safeguards provided in article 5 in favour of citizens must be complied with if the exercise of an executive act pursuant to the power conferred by the law is to be made valid."

Article 162(6) of the Constitution provides as follows:—

"Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

This is what the Privy Council did in the case of *B. Surinder Singh Kanda* v. *The Government of the Federation of Malaya*,[1] although the modification which the court had to make in that case was comparatively simple. Wan Suleiman J. in *Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan*,[2] disagreeing with what Sutherland J. and in *Chia Khin Sze* v. *Mentri Besar of the State of Selangor*,[4] held that the Restricted Resident Enactment is valid but subject to article 5 of the Constitution. I respectfully agree with what his Lordship said in that case, namely, that there should be read into the Enactment the rights of an arrested person:—

(i) to be informed within a reasonable time of the grounds of his arrest,

(ii) to be produced within twenty-four hours before a magistrate and not to be detained in further custody without the magistrate's authority, and

(iii) to be allowed to consult and be defended by a legal practitioner of his own choice.

There is no difficulty about informing an arrested person of the grounds of his arrest. In the present case there is an affidavit by Godwin Anthony, Acting Deputy Superintendent of Police, that the applicant was so informed, although this has been denied by the applicant. Again, there is no difficulty about producing an arrested person before a magistrate. The magistrate must be informed that the person has been arrested under section 2(i) of the Enactment and that he is to be detained pending an order being made under section 2 (ii) of the Enactment. What in effect the magistrate will be required to do will be to endorse the order of the Mentri Besar. As the Enactment makes no provision for bail the magistrate will have no option but to remand him in custody and have him produced before him from time to time so as to ensure that the enquiry is proceeded with without delay. This will provide a safeguard against the person being detained too long. Such detention will be no different from the remand in custody pending trial of an arrested person if bail is refused.

I can also see no difficulty about a person arrested under section 2(i) of the Enactment being allowed to consult a legal practitioner of his choice. He must be told of his right so that his counsel can submit a written memorandum in his defence. This the counsel can do only if he is supplied with a concise statement of the allegations upon which a person has been arrested. The Enactment does not say that there should be an inquiry. But as any arrested person has a right to be given an opportunity to defend himself, to allow him such an opportunity and to consider what he or a counsel of his choice says on his behalf in answer to the allegations in support of the order sought against him would be tantamount to holding an inquiry. The important thing is that he must not be condemned without being heard. Although a legal practitioner may have no right of audience at an inquiry before an executive officer, there can be no objection to his being present at the inquiry to make oral submissions. It would, of course, be desirable for the Mentri Besar to order a judicial inquiry, but this he cannot do without a provision in the law to that effect. The provisions of article 5, to my mind, are designed to apply more specifically, although not excusively, to criminal trials. A special tribunal need not conform to the procedure of law courts, and in particular it need not adopt the process of an oral hearing, but a party must have an opportunity of presenting his case (*Local Government Board* v. *Arlidge*[5]). The object of the Enactment is not to try a person for a criminal offence but to restrict his residence in the interest of public order. If the rights embodied in article 5 of the Constitution are denied to him he has a remedy under clause 2 of article 5 which reads as follows:—

"(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

For the reasons I have stated, my answer to the question referred to this court is in the negative.

**Raja Azlan Shah J.:** My answer to the question referred to us is also in the negative. I should have contented myself with that simple statement, but out of deference to the arguments of both counsel and, I must add, to the fluctuations of my own mind as the arguments proceeded, I should like to give my reasons. For my part I wish only to consider three substantial points raised before us.

The question referred to us under section 48 of the Courts of Judicature Act, 1964, is whether

"The provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void."

Paraphrasing the question, is a pre-Merdeka law unconstitutional because it does not provide

all the safeguards contained in our Constitution which formulate specific individual rights? It is not, however, our purpose, nor are we required to decide the question whether the order of arrest and detention against the petitioner violates the provisions of the Constitution. That is the province of the trial judge after applying the law as propounded by this court to the facts as found by him.

The Restricted Residence Enactment is impugned as violating article 5(1), (3) and (4) and article 9(2) of the Constitution. When these provisions are examined closely they will be found to contain valuable safeguards ensuring (a) the right to be informed of the grounds of arrest, (b) the right to consult and to be defended by a legal practitioner of the arrested person's choice, (c) the right to be produced before a magistrate within 24 hours, (d) freedom from detention beyond the said period except by order of a magistrate, and (e) the right to move freely throughout the Federation and to reside in any part thereof.

Dato' Marshall contends that it is impossible to modify the impugned Enactment, in particular section 2, so as to bring it into conformity with the Constitution because if we did that, we would be re-enacting the law, and that is not our business. Our attention is also drawn to the provisions of article 162 and article 163 (4) of the Constitution. He submits that in the light of these constitutional provisions the courts can apply laws in existence prior to Merdeka Day only insofar as they are not inconsistent with the provisions of the Constitution and the courts have the authority and indeed the duty to repeal provisions in these pre-Merdeka law which cannot be adopted and amended to comply with the provisions of the Constitution. The Privy Council case of *Surinder Singh Kanda* v. *The Federation of Malaya*,[1] and the decision of Wan Suleiman J. in *Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan* [2] were also referred to us.

The learned Solicitor-General contends that the said Enactment, being Federal law on Merdeka Day (article 160) and being a law which Parliament has power to make (article 9(2)), its validity cannot be challenged on the ground that it restricts freedom of movement (article 4(2)). He submits that the absence of provisions comparable to article 5 does not invalidate the Enactment because the constitutionality after Merdeka Day of the Enactment is covered by article 162(1) which enacts that it shall continue to be in force with such modifications and amendments by Parliament and in the absence of such modifications by any court or tribunal applying it will make under article 162(6). *Aminah*'s case, *supra*, was also relied in support of this contention.

We are not here to repeal or amend the impugned law; that is a legislative function. We are to consider whether the impugned law which admittedly is silent on the question of fundamental rights must be read subject to these rights. Article 162(1) which deals with existing laws does not render them void *ab initio*. It expressly enacts that existing laws "shall continue in force on or after Merdeka Day" with such modifications as may be necessary to bring it into conformity with fundamental rights. In other words, after Merdeka Day no existing laws can be allowed to stand in the way of the exercise of fundamental rights. Such inconsistent laws are not wiped off the statute book, for so to hold would be to give fundamental rights a retrospective effect which the law holds they have not: (see *Keshavan Madhava Menon* v. *State of Bombay* [6]).

The true position, in my opinion, is that the impugned law which violates fundamental rights becomes eclipsed until it is modified to remove the shadow and to make it free from blemish or infirmity. If that were not so, then it is not understandable what "existing law" can be said to be modified so as to bring it into conformity with the Constitution. The impugned law which violates constitutional conditions is not a nullity or void *ab initio* but remains unenforceable by reason of those conditions, but once the conditions are observed the law becomes effective and I perceive no adequate grounds for adjudging that a re-enactment of the impugned law is required before it can have effect. In the light of the above reasoning, I take the view that Wan Suleiman J. quite rightly interpreted the provisions of article 162(1) of the Constitution when dealing with the fundamental rights declared in article 5(3): (*Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan, supra*).

I will now deal with the provisions of article 9 clause (2) of the Constitution.

It is urged that the impugned Enactment is controlled by the safeguards of article 9 clause (2) in that inasmuch as it curtails the freedom of movement throughout the Federation and the freedom to reside in any part thereof it is *ultra vires* the Constitution. The view of the learned Solicitor-General, as earlier indicated, is that Parliament can restrict such freedom by virtue of article 9 clause (2) read with clause (3) and as such its validity cannot be challenged (article 4 clause (2)). That is a correct line of reasoning. The concept of the right of freedom and residence throughout the

Federation or any part thereof is entirely different from the concept of the right of personal liberty mentioned in article 5 clause (1), and article 9 clause (2) should not therefore be read as controlled by the provisions of article 5. The rights protected by article 9 clause (2) are not absolute rights. They may be subordinated to the larger social interests. As Holmes J. used to say: "In a complicated society there are no absolutes." Each of these rights is liable to be curtailed by laws made or to be made by Parliament to the extent mentioned in clause (2) read with clause (3), that is, in the interests of the security of the Federation, public order, public health, or the punishment of offenders, restricting freedom of movement or residence between a State and other States. If these rights are absolute rights then Parliament would be completely debarred from making any law taking away or abridging any of those rights. The net result is that the unlimited legislative power of Parliament given by article 74 is cut down by the provisions of article 9 clause (2) and clause (3) and all laws made by Parliament with respect to these rights must, in order to be valid, observe these limitations. Whether any law has in fact transgressed these limits is to be ascertained by the court.

The true view, in my opinion, is that article 9 clause (2) does not refer to the freedom of movement or residence simpliciter but guarantees the right to move freely "throughout the Federation" and the right to reside in any part thereof. Clause (2) read with clause (3) authorise the imposition of "restrictions" on these rights in the interests of security, public order, public health or the punishment of offenders. Reading the provisions of article 9 together, it is reasonably clear that it was designed primarily to emphasise the factual unity of the Federation and to secure the right of a free citizen to move from one place in the Federation to another and to reside in any part thereof. In short, the object of article 9, not unlike article 13(1) of the Declaration of Human Rights, is to remove all internal barriers in the country and to make it as a whole the dwelling place of all citizens. It has nothing to do with the freedom of the person as such. That is guaranteed to any person, citizen or non-citizen (except enemy alien) in the manner and to the extent formulated by article 5.

For the above reasons there is no doubt that a law which restricts a person to reside in a particular district or mukim falls exclusively under article 5 of the Constitution and that the constitutionality of such a law cannot be questioned with reference to article 9(2).

The other main argument advanced by Dato' Marshall that the impugned Enactment is *ultra vires* is based on the maxim *delegatus non potest delegare.*

In my view, this is not such a case. In the pre-Merdeka days there is no doubt that the Resident was vested with administrative plenary powers to issue an order of restricted residence. But after Merdeka Day the law relating to restricted residence is centralised. It is now the Minister who is vested with plenary powers with regard to restricted residence.

The pith and substance of the matter is to what extent, if any, the Minister can delegate his functions under the Restricted Residence Enactment to the Mentri Besar? Let us examine whether there is some express authority in that behalf. Section 5 of the Delegation of Powers Ordinance, 1956, contains an express provision enabling a Minister to delegate his powers. It reads as follows:—

> "5. Where by any written law a Minister is empowered to exercise any powers or perform any duties, he may, subject to the provisions of section 11 of this Ordinance, by notification in the *Gazette* delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office."

The question then arises as to how far that enables him to delegate his powers to make an order of restricted residence. The authority to make such orders is given by section 2 which is in these terms:—

> "2. (i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim or should be prohibited from entering into any particular district or districts or mukim or mukims the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison for the detention of such person.
>
> (ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in such order, such person do reside in such district or mukim as may be specified in the order or do not enter into such district or districts or mukim or mukims as may be so specified.
>
> (iii) An order made under sub-section (ii) may be for the life of the person to whom it relates or for a term to be stated in the order, and may at any time be revoked, cancelled, or varied by the Minister."

There is no doubt that under section 2 the Minister cannot issue an order for the arrest and detention of any person unless it "appears" to him that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim. That is a condition precedent to the exercise of the power. In a sense he is under a duty to be satisfied before making such orders. Can this duty by the Minister be delegated to someone else? Dato' Marshall says that it cannot.

The authority of the Minister to delegate, he says, applies only to powers and not to duties. He finds support for his argument in the wording of L.N. 279 of 20th August, 1959 which defines the Minister's authority to delegate:—

"In exercise of the powers conferred by section 5 of the Delegation of Powers Ordinance, 1956, the Minister of the Interior and Justice hereby delegates to the Mentri Besar or Chief Minister of a State the exercise of the powers conferred upon the Minister by sections 2, 2A and 5 of the Restricted Residence Enactment of the Federated Malay States as extended to apply throughout the Federation by the Restricted Residence (Extended Application) Ordinance, 1948:

Provided that the Mentri Besar or Chief Minister shall not exercise any such power in respect of any person who is not ordinarily resident in the State or in respect of any place outside the State."

The effect of this Legal Notification, Dato' Marshall contends, was to authorise a Minister to delegate his powers conferred upon him by section 2 of the Enactment to make the order but it did not authorise him to delegate his duty to be satisfied. He was bound to perform his duty himself and as the Minister had never fulfilled that duty the transfer of power to the Mentri Besar is *ultra vires*. I cannot agree with this line of reasoning. The power of the Minister to make the said order can only be exercised when he is "satisfied" or when it "appears" to him that there are reasonable grounds. The requirement that he is to be satisfied that there exist reasonable grounds is nevertheless also a condition or limitation on the exercise of the power, and when the Minister delegates the exercise of the power conferred upon him by section 2 of the said Enactment to the Mentri Besar he delegates to such person the fulfilment of all the conditions and limitations attaching to it even though they be also duties. Where a power is coupled with a duty, the power cannot be divorced from the duty. They are inseparable; whoever exercises the power, he it must be who has to perform the duty, which is a condition precedent for the exercise of the power.

We may usefully refer to two authorities. The first is the decision of the Privy Council in *Mungoni* v. *Attorney-General of Northern Rhodesia.*[3] The Acting Governor of Northern Rhodesia, acting under his statutory powers, delegated his powers under regulation 16(1) of the Emergency Powers Regulations, 1956, of Northern Rhodesia to the Provincial Commissioner, Western Province. The detention order made by the latter was attacked as being invalid. Similar reasons were urged before the Privy Council which held that the power and the duty under regulation 16(1) are so interwoven that it was not possible to split the one from the other so as to put the duty on one person and the power on another person, the regulation contained not so much a duty but rather a power coupled with a duty, and he who exercised the power had to carry out the duty. The Privy Council therefore took the view that in delegating his functions under the said regulation the Acting Governor could delegate both the power and duty together to one and the same person — he could not delegate the power to another and keep the duty to himself.

The other case is *State of Bombay* v. *Shivbalak.*[7] By section 5 of the Bombay Tenancy and Agricultural Law Act, 1948, the State Government is under an obligation to hold an enquiry as to whether a particular agricultural land in the State has remained uncultivated or fallow for the period prescribed by statute. If after such enquiry it appears to the State Government that the said land is uncultivated for the said period it may make a declaration that the management of such land be resumed by Government. Section 83 of the said Act in terms authorises delegation by the State Government to any of its officers of the specified status and the delegation can be in respect of all or any of the powers conferred on the State Government by the provisions of the Act. The Deputy Collector, acting under delegated authority, made an order directing that the land of the respondents should be resumed by Government for cultivation as the latter had statutorily failed to cultivate it. In answer to a similar argument which was raised before us the Indian Supreme Court took the view that the authority to delegate all or any of the powers which are expressly conferred on the State Government by section 83 would be rendered almost meaningless if the duty to hold an enquiry as a condition precedent for the exercise of the said authority cannot be delegated. In the context, the power which can be delegated is inseparable from the enquiry which must precede the exercise of the power, and so, in order to make section 83 effective it is necessary to hold that the delegation of the power authorised by the said section must necessarily involve the delegation of the discharge of obligations or functions which are necessary for the exercise of the said power. On a fair and reasonable construction of section 83 it was held to authorise the delegation not only of the powers mentioned by it but also of duties and functions which are incidental to the exercise of the powers and are integrally connected with them. For similar reasons I hold in our case that the transfer of powers to the Mentri Besar is not *ultra vires*.

*Question answered in the negative.*

Solicitors: *David Marshall.*